Nos. 81-2245, 81-2246 & 82-38

Office - Supreme Court, U.S.
FILED
DEC 20 1982
ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1982

STATE OF NEVADA,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

and

TRUCKEE-CARSON IRRIGATION DISTRICT,

Petitioner,

v.

UNITED STATES OF AMERICA and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Respondents.

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Cross-Petitioner,

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, et al.,

Cross-Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE, STATE OF WASHINGTON AND STATE OF IDAHO

DAVID H. LEROY
Attorney General of Idaho

PHILLIP J. RASSIER
Deputy Attorney General
Dept. of Water Resources

NEIL L. TILLQUIST
Deputy Attorney General
Room 210, Statehouse
Boise, ID 83720
(208) 334-2400

KENNETH O. EIKENBERRY
Attorney General of Washington

CHARLES B. ROE, JR.
Sr. Assistant Attorney General

ROBERT E. MACK
Assistant Attorney General
Temple of Justice
Olympia, WA 98504
(206) 459-6162

STATE PRINTING PLANT ◆ OLYMPIA, WASHINGTON

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TRUCKEE-CARSON IRRIGATION DISTRICT, et al.,

Cross-Respondents.

BRIEF OF AMICI CURIAE, STATE OF WASHINGTON AND STATE OF IDAHO

The States of Idaho and Washington, through their respective attorneys general, file this brief amicus curiae in accordance with Rule 36 of the Court. This brief is submitted in support of the petitioner State of Nevada.

STATEMENT OF INTEREST

The States of Idaho and Washington, like other western states including Nevada, have relied for decades on a comprehensive state general adjudication process to judicially confirm and correlate rights to water as among all water users of any particular stream system.[1] This process culminates in the entry of a decree setting forth the elements of all existing water rights in the system. Each right so confirmed is adverse to all other rights included in the decree in terms of the quantity and relative priority for exercise of the rights. Of importance, water users joined in this judicial process must claim all of their existing rights in the proceeding in order to retain those rights. II Hutchins, *Water Rights Laws in the Nineteen Western States*, chapter 15 (1974).

A "general adjudication" (or "general determination ") is a cornerstone of the water right codes of western states, such as Idaho and Washington. This unique form of quiet title action necessarily contemplates that all claimants to water rights within a stream system (including the United States and those it represents)[2] are to be joined in one proceeding for the purpose of proving their claims to existing rights and of contesting (if they desire) the claims of others. Established law in the West is that the final judgment in a general adjudication sets forth *all* water right claims determined to be valid, and correlates them by priority dates.[3]

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[1]Idaho's water right adjudication statutes are codified in chapter 14, title 42, Idaho Code. Washington's water right adjudication provisions are codified at RCW 90.03.110 *et seq.*

[2]Congress consented to the joinder of the United States in general adjudications by its enactment in 1952 of the "McCarran Amendment," 43 U.S.C.A. § 666. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

[3]The Washington Supreme Court has emphasized for decades that:

> Taking the water code as a whole, its very purpose is to settle and determine all rights and priorities to the use of the water under investigation. By its terms, the judgment is designed to be *a final adjudication of the rights of all parties.*

McLeary v. Department of Game, 91 Wn.2d 647, 651, 591 P.2d 778 (1979), quoting from *Wilson v. Angelo*, 176 Wash. 157, 160, 28 P.2d 276 (1934) (emphasis added).

The benefits derived from a completed general adjudication proceeding have long been recognized by this Court, which emphasized over sixty years ago that:

> It [a general adjudication] is intended to be universal and to result in a complete ascertainment of all existing rights, to the end; First, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; Second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties, and, Third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 448 (1916).

A fundamental concept, important to this case, is that a general adjudication procedure contemplates that, after the entry of a final judgment, *the only rights remaining in existence* are those specified in that judgment. All other rights, even though they may have existed prior to the adjudication, are no longer valid. This concept is embodied in the water codes of both Washington and Idaho.[4]

It is crucial to the accomplishment of the purposes of a general water rights adjudication that all parties thereto be bound by the final decree confirming the existing water rights of each party. The decision of the Court of Appeals in this case threatens to upset established western water law by failing to acknowledge this fundamental principle.

The Court of Appeals' decision, while for the most part deciding correctly the issues concerning application of

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[4]The Washington code, for example, states that:

> Whenever proceedings shall be instituted for the determination of the rights to the use of water, any defendant who shall fail to appear in such proceedings, after legal service, and submit proof of his claim, shall be estopped from subsequently asserting any right to the use of such water embraced in such proceeding, except as determined by such decree.

RCW 90.03.220.

"res judicata" principles in this case, announces an exception to the doctrine of res judicata that threatens achievement of the basic objectives of state general adjudication programs. This exception — concerning lack of "adversity under the pleadings" — provides that the United States (when representing conflicting interests of the United States) may escape the res judicata effects of a general adjudication decree through its own improprieties, by failing to represent properly any interest of the United States during the adjudication process.

Idaho and Washington are especially concerned about this novel and incorrect formulation of the law by the Ninth Circuit because of the participation by the United States in most of the general adjudications initiated in their state courts over the past quarter-century. In Washington, for example, the United States has been a party in general adjudications in which it has submitted water right claims on behalf of both its Indian and non-Indian interests.[5]

SUMMARY OF ARGUMENT

Any claims of the United States on behalf of the Pyramid Lake Paiute Indian Tribe for a reserved water right for fishery purposes should have been made in the

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[5]Since 1962, Washington State courts have ruled upon or considered United States' claims for Indian reserved rights in four significant general adjudications. They are:

(1) *In re Chiliwist Creek*, Okanogan County No. 16323 (filed January 16, 1961, final decree entered May 16, 1967);

(2) *In re Bonaparte Creek*, Okanogan County No. 17787 (filed December 27, 1968, final decree entered December 14, 1979);

(3) *In re Antoine Creek*, Chelan County No. 34113 (filed March 31, 1980, now being processed); and

(4) *In re Yakima River*, Yakima County No. 77-2-01484-5 (filed October 12, 1977, now being processed).

The most important of these, *In re Yakima River*, involves more than five-thousand, five hundred served defendants and more than two-thousand water right claimants, including the United States as a claimant for Indian reserved water rights (pertaining to the Yakima Indian Reservation).

Orr Ditch proceeding (*United States v. Orr Water Ditch Co.*, Equity No. A3, D.C. Nevada, Final Decree entered September 8, 1944). The *Orr Ditch* action was a general adjudication intended to settle all rights of the parties to the proceedings, and of those they represented.

Since the Tribe was represented by the United States in the adjudication proceeding, res judicata should apply to the Tribe. The requirement applied by the Court of Appeals — that the claims of the parties represented by the United States were required to have been shown "adversity under the pleadings" before res judicata applies — has no place in a general water rights adjudication. Once the United States becomes a party to an adjudication it is bound by the final decree of the court, regardless of the nature or extent of the claims made or attempted to be proved; in this respect the United States is no different, and should be no different, than any other party.

To the extent that res judicata is not applied to a portion of the validly existing *Orr Ditch* decree, all adjudication actions in which the United States represented (or will represent in the future) multiple parties or interests are subject to the threat of a lack of finality. The principle of finality of water right decrees should not be sacrificed to reach an expedient (yet incorrect) result in a single case.

ARGUMENT

A. THE ASSERTION OF A RESERVED RIGHT FOR FISHERY PURPOSES SHOULD HAVE BEEN MADE IN THE *ORR DITCH* PROCEEDING.

1. Res Judicata Bars the Tribal Claim for a Reserved Right for Fishery Purposes in Pyramid Lake.

The purpose of res judicata is to ensure the finality of judgments and to prevent relitigation of disputes. 1B Moore, *Federal Practice*, ¶ 0.405[1] at 628 (2d ed. 1974); Restatement of Judgments, §§ 1, 80, comment b (1942). Collateral estoppel, a related doctrine, prevents a party

from relitigating an issue decided in a prior suit. As the Court of Appeals noted in this case, "There are hardly maxims 'more firmly established or of more value in the administration of justice, than those designed to prevent repetitious litigation.'" *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1308 (9th Cir. 1981).

The principles of res judicata and collateral estoppel were recently summarized by this Court as follows:

> Application of both doctrines [res judicata and collateral estoppel] is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana v. United States, 440 U.S. 147, 153-154 (citations and footnote omitted). The necessity of producing a conclusive judgment is particularly critical in litigation concerning title to real property. *United States v. Title Insurance and Trust Co.*, 265 U.S. 472, 486-487 (1924); *Minnesota Mining Co. v. National Mining Co.*, 70 U.S. (3 Wall.) 332, 334 (1866). As with title to land, great reliance is placed on the certainty of the nature and scope of water rights in the arid western states.

The circumstances of the present case demonstrate the importance and necessity of the doctrine of res judicata. Thirty-seven years ago a comprehensive civil action was concluded which assessed and apportioned all water rights of the Truckee River. The objective of the *Orr Ditch* action was to provide a decree on which all private and public parties, including the United States, could rely.

The *Orr Ditch* complaint was drafted to permit the government to assert "the fullest sort of reserved rights for the [Pyramid Lake Piaute Indian] Reservation." 649 F.2d at 1291. On the basis of that litigation a comprehensive decree was issued fixing the quantity and priority date for

all water users of the Truckee River. As trustee for the Tribe, the United States was decreed a reserved water right of approximately 30,000 acre feet for irrigation of reservation land. (No intervention was sought by the Tribe and no appeal was taken from that decree.) Faith in the conclusiveness of that adjudication allowed, over almost four decades, for the planning and commitment of vast amounts of time, money, and resources by both the federal and state governments (and private parties) for achievement of national policies supporting beneficial use of water.

a. Respondents' Present Suit is the Same Cause of Action Litigated in *Orr Ditch*.

Both the district court and the Court of Appeals held that the present cause of action to acquire reserved water rights for fisheries is the same cause of action giving rise to the *Orr Ditch* litigation. 649 F.2d at 1302. However, the United States and its supporters contend that, because the issue concerning fisheries was not raised in the *Orr Ditch* decree, their present action is not barred by res judicata. Respondents attempt to avoid the operation of res judicata by dividing their claim for reserved water rights into two parts: fisheries and other beneficial uses. However, the law is well established that one cannot avoid the impact of res judicata by splitting a cause of action or by failing to assert in a prior litigation a claim which was *properly* subject to that litigation. *Chambers v. Colonial Pipeline Co.*, 296 F. Supp. 555 (E.D. Tenn. 1968), appeal dismissed 408 F.2d 678 (6th Cir. 1969), cert. denied 396 U.S. 1020, rehear. denied 397 U.S. 929 (1970); *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967).

Respondents' contention that all claims for impliedly reserved water rights need not be asserted in a general adjudication of water rights does not comport with the scope of water adjudications in general, and certainly not with the scope of *Orr Ditch*. Due to the finite supply of water and the interdependence of water users, the only recognized method of adjudicating water rights

comprehensively is to bring all water users into court at the same time. This principle is well-established in state law. See *People of the State of California v. United States*, 235 F.2d 647 (9th Cir. 1956); *Miller v. Jennings*, 243 F.2d 157 (5th Cir. 1957); *Green v. Chaffee Ditch Co.*, 371 P.2d 775 (Colo. 1962). It likewise is well-established under federal law. See *United States v. District Court for Eagle County*, 401 U.S. 520 (1971).[6]

Moreover, because of the relative nature of water rights and because of the need to reach a final resolution of the quantity of water to which each party is entitled, all claimants in a general adjudication proceeding must assert all claims to which they are entitled.

Conclusive resolution of water rights adjudications has been, and remains, essential to the development of the western states. Such conclusiveness is fundamental to a long term commitment of resources. See, e.g., *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440, 448-449 (1916). Respondents' position that the United States may split its cause of action as to impliedly reserved water rights would, by encouraging a substantial element of uncertainty, defeat the very purpose of the general adjudication systems.

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[6]For example, one purpose of the McCarran Amendment, as its author explained to the Senate, was

> * * * to allow the United States to be joined in a suit wherein it is necessary to adjudicate *all of the rights* of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

United States v. District Court for Eagle County, 401 U.S. 520, 525 (1971).

The sound reasons behind such a policy had been recognized by this Court decades earlier when it stated that, properly, in a general water rights adjudication:

> All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and *all have the same relation to the proceeding.*

Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 447-448 (1916) (emphasis added).

The purpose of the *Orr Ditch* decree was to produce a declaration which fixed interdependent water rights to the Truckee River on which water users could rely to commit enormous amounts of human and financial resources. To this end all water users were joined in one water rights adjudication. The district court found that "*Orr Ditch* was intended by all concerned, lawyers, litigants, and judges, as a general all-inclusive water adjudication suit which sought to adjudicate all rights and claims" to the Truckee River. Moreover, the decree sought to adjudicate "the fullest sort of reserved rights for [the Tribe]." Failure of respondents to assert a reserved water right for fisheries, which was properly subject to the *Orr Ditch* litigation, bars relitigation to alter apportioned water rights which have been relied on for thirty-seven years.

The United States has incorrectly contended that a different cause of action from that litigated in *Orr Ditch* is now presented. Among the claims upon which relief was granted in *Orr Ditch* was the existence of an impliedly reserved water right. The evidence necessary to establish this reserved water right was proof of a reservation, the date of reservation, and the purpose of the reservation. See, *Cappaert v. United States*, 426 U.S. 129 (1976); *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939). Although the quantity of water would vary with the purposes for which the water is used, the claim for impliedly reserved water rights is the basis which gives rise to apportioning any water to the Tribe, and it was based upon that claim that 30,000 acre feet of water was decreed to the United States as trustee for the irrigation of reservation land. Moreover, even assuming, arguendo, that different evidence was necessary to establish a claim for reserved water rights, the "same evidence" test is one of many tests used in applying res judicata and is not determinative of this case. 1B Moore, *Federal Practice*, ¶ 0.410[1] at 1157-58 (2d ed. 1980). In this context, the better approach is to recognize the critical importance of asserting all water claims simultaneously in a single

proceeding, taking into account the relative and continuous relationship of water users of a particular stream. See, National Water Commission, *A Summary-Digest of State Water Laws* 21 (1973).

b. Res Judicata Bars Relitigation of the Tribal Claims as against the *Orr Ditch* Defendants.

Both the trial court and the Court of Appeals held that res judicata barred the United States and the Tribe from relitigating their claim for impliedly reserved water rights as against the *Orr Ditch* defendants. But, there is now a contention that the United States' representation of the interests of the reclamation project and the Tribe was of sufficient impropriety to defeat the operation of res judicata. This position is contrary to well-established law, and ignores opposing equities and more equitable alternative remedies.

Although a represented party is not bound by its representation to an opposing party where the opposing party was aware of a breach of the representative's fiduciary duties, an opposing party may assert res judicata as a bar where the opposing party is unaware of such impropriety. Restatement (Second) of Judgments, § 42, comment f, pp 410-411 (1982). In the present case, the district court found that the alleged impropriety of the government's representation "was unknown to the defendants of *Orr Ditch*." Finding No. 31, R.5602. *This finding is unchallenged by the respondents.*

As noted by the dissent in the Court of Appeals' decision, "[the United States' formal representation of the irrigation district water users and the tribe], as we all agree, was not generally understood to have involved any impropriety during the course of the *Orr Ditch* litigation." 649 F.2d at 1314. This is so because, when the United States brings a quiet title action, it must do so in all of its capacities, as it is barred by res judicata from relitigating claims in any of its capacities. *United States v. California and Oregon Land Co.*, 192 U.S. 355 (1904). The United States often represents many interests, including those of

Indians, in a single litigation. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *United States v. District Court, in and for Water Division No. 5, Colorado*, 401 U.S. 527 (1971); *Arizona v. California*, 373 U.S. 546 (1963). Furthermore, the United States' representation in *Orr Ditch* did *not evidence* any breach of fiduciary responsibilities. This conclusion is supported by the fact that, after extensive field work and survey, there appeared to exist ample water available from the reclamation project to meet the needs of the Tribe:

> [W]e have always had it in mind that there could be no conflict of interest between the Reclamation Project and the Indian Reservation as to the irrigation of these 2,400 acres of delta lands, because these lands are the last on the river and we thought that the return flow from irrigation below the headgate of the single canal that serves all of the Reclamation Project lands would be ample to irrigate these Indian lands so that never would their Reclamation Project have to refrain from diverting water in order to satisfy the Indians' earlier priority.

649 F.2d at 1292.

Both lower courts held that, while the representation of both the Reclamation Project and the Tribe may have involved a breach of the United States' fiduciary obligations to the Tribe, the *Orr Ditch* defendants, unaware of any alleged impropriety, should be permitted to rely on the fundamental function of the general adjudication system, *viz.*, conclusive resolution of disputes over water use.

c. Res Judicata Bars Relitigation of the Tribal Claims as against the Truckee-Carson Irrigation District.

Although finding the respondents were barred by res judicata from asserting an impliedly reserved water right to the Truckee River as against the *Orr Ditch* defendants, the Court of Appeals reversed the district court's ruling as to the Truckee-Carson Irrigation District, stating that, because there is no "adversity under the pleadings"

between the Tribe and the irrigation district water users, the Tribe was free to relitigate its apportioned water rights with the irrigation district water users.

The formal requirements of "adversity under the pleadings" does not comport with the water adjudication process. Because of the interdependency of every water user on the stream, the only proper method of adjudicating water rights is to join together all parties. *People of the State of California v. United States, supra; Miller v. Jennings, supra.* Whether everyone is denominated as plaintiffs or as defendants in a complaint, or some are denominated as plaintiffs and some as defendants, is immaterial to the task of the court in apportioning water rights.[7] What is required is that all water users be joined in one suit to permit the court to apportion the limited resource among competing claims. 649 F. 2d at 1311.

The insignificance of how each party is denominated in the pleadings is well established in water law adjudications. Thus, the Idaho Supreme Court, in *Morgan v. Udy,* 58 Idaho 670, 79 P.2d 295 (1938), rejected the contention that co-parties to a water rights adjudication had not been adversaries. In quoting *Frost v. Alturas Water Co.,* 11 Idaho 294, 301, 81 Pac. 996, 998 (1905), the court opined that:

> [In] the settlement of cases of this character every user of water on the stream and all its tributaries in litigation are interested in the final award of each claimant. * * * Every claimant of the water of either stream * * * is interested in a final adjudication of all the claimants of all the waters that flow to the claimants at the lower end of the stream after its junction. In other words, in my view of the question presented by the demurrer, it matters but little who are plaintiffs and who are defendants in the

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[7]An analogous situation exists in interpleader actions where competing claims are made for a limited amount of property. The plaintiff interpleads as defendants all known parties which may have an interest in the property. In adjudications each party's claim is the important document; it is immaterial which party is considered the plaintiff and which is the defendant. Wright & Miller, *Federal Practice and Procedure,* § 1714, "Interpleader," pp. 441-442 (1972).

settlement of cases of this character; the real issue being who is first in right to the use of the water in dispute.

Nor does the fact that the Tribe and the irrigation water district users were represented by the United States preclude the application of res judicata. As noted above, both lower courts correctly held that where an opposing party is unaware of the breach of a fiduciary's duty of representation to a represented party, the opposing party is justified in relying on the conclusive nature of that judgment. To the extent the *Orr Ditch* defendants are properly permitted to rely on the *Orr Ditch* decree, so should the irrigation district water users be permitted to rely on the final decree. There is no suggestion that these water users knew any more of the government's alleged impropriety than did the *Orr Ditch* defendants. Nor do the equities suggest that the alleged impropriety should be imputed to the irrigation district water users. The individual water users who rely on reclamation project water do not stand in any special relationship with the United States which would justify disrupting their reliance on the decree. Indeed, federal law points to the contrary. See *Ickes v. Fox*, 300 U.S. 82 (1937).

If the United States has breached its fiduciary obligations to the Tribe and the Tribe has suffered harm thereby, the Tribe's remedy lies in a claim against the United States, which breached that duty, not against third parties who have justifiably relied on the conclusiveness of the *Orr Ditch* decree. Remedies for damages do exist and have been utilized by tribes.

Well-established law with respect to general water adjudications should not be abandoned to rectify the apparent misfeasance of the Tribe's trustee. The western states, and their citizens, must have a system on which they can rely for orderly development of their lands. The Tribe's proper remedy lies in an action for breach of the fiduciary obligation owed it by the United States.

CONCLUSION

The Court should reverse the decision of the Ninth Circuit insofar as the Truckee-Carson Irrigation District interests are denied the benefits of the doctrine of res judicata. The holding that all other defendants are entitled to res judicata should be affirmed.

DATED: December 16, 1982.

Respectfully submitted,

DAVID H. LEROY
Attorney General

PHILLIP J. RASSIER
NEIL L. TILLQUIST
Deputy Attorneys General

Attorneys for Amicus Curiae
State of Idaho

KENNETH O. EIKENBERRY
Attorney General

CHARLES B. ROE, JR.
Senior Assistant Attorney General

ROBERT E. MACK
Assistant Attorney General

Attorneys for Amicus Curiae
State of Washington